IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 18TH JANUARY 2007 / 28TH PAUSHA 1928

CRL.A.No. 2036 of 2006()

SC.175/2004 of ADDL. SESSIONS COURT (SPL. COURT FOR NDPS ACT CASES), THODUPUZHA

CP.25/2003 of JUDL. MAGISTRATE OF FIRST CLASS COURT, KATTAPPANA

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APPELLANT/ACCUSED:

ROY, C.NO.605,
CENTRAL PRISON, TRIVANDRUM.

BY ADV. ADV.T.K.KUNHABDULLA(STATE BRIEF)

RESPONDENT/STATE:

STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 2036 OF 2006

Dated this the 18th day of January, 2007

JUDGMENT

The appellant is the accused in Sessions Case No.175 of 2004 on the file of the Additional Sessions Court (Special Court for N.D.P.S. Act Cases), Thodupuzha. He faced trial for the offences punishable under Sections 55(a)(1) and 8(1) read with Section 8(2) of the Abkari Act.

2. The prosecution allegation against the appellant was that on 14.6.2002 at 1.15 p.m., he was found in possession of 10 litres of arrack in two plastic containers each containing 5 litres of arrack and engaged in the sale of arrack near the market at Vazhavare. To prove the case against the appellant, the prosecution examined PWs.1 to 5 and produced Exts.P1 to P9 as well as MOs.1 to 4. Though the appellant denied the allegations levelled against him when he was questioned under Section 313 Cr.P.C., the trial court, relying on the evidence adduced by the prosecution, found the appellant guilty of the above charges, convicted him thereunder and sentenced him to undergo simple imprisonment for a period of four years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to

undergo simple imprisonment for a further period of one year under Sections 55(a) and 8(1) of the Abkari Act. No separate sentence was awarded under Section 55(1) of the Abkari Act. The above conviction and sentence are challenged in this appeal.

3. This appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. Learned counsel appearing for the appellant has raised two main contentions before this Court: (i) the trial court committed serious error in relying on the evidence of PW.5 to find the appellant guilty of the offences alleged against him and (ii) the finding of the trial court that the appellant was guilty under Section 55(a) of the Abkari Act is unsustainable in law as per the principles laid down by this Court in **Purushan v. State of Kerala, 2002(2) K.L.T. 661, Surendran v. Excise Inspector, 2004(1) K.L.T. 404** and **Sudhepan @ Aniyan v. State of Kerala, 2005(2)K.L.D.(Cri.) 631**.

5. The entire prosecution case is projected through the evidence of PW.5. He was the Sub Inspector of Police, Kattappana at the time of the incident. He stated that on 14.6.2002 at 12 a.m. he got reliable information

to the effect that the appellant was selling arrack near the market at Vazhavara and that on reaching the place, he saw two persons standing near the appellant and the appellant selling arrack to one of them. This witness further stated that he sent one police constable in mufti to the place of occurrence and that he caught hold of the appellant, but the appellant escaped and ran away from the place of occurrence. PW.5 further stated that he examined the plastic containers and took 150 ml. of arrack from each container for chemical analysis. This witness also gave evidence to the effect that he seized MO.1series of bottles, MO.2 glass and MOs.3 and 4 plastic containers on preparing Ext.P1 mahazar in the presence of PWs.1 to 4 and produced the material objects before the court on 15.6.2002.

6. PWs. 1 to 4 were examined to prove seizure of the contraband articles and taking of samples. The evidence of these independent witnesses does not corroborate with the version given by PW.1. PWs.2 to 4 stated that they had not seen the appellant at the place of occurrence, but they admitted their signature in Ext.P1 mahazar. Even PW.1 admitted his signature in Ext.P1. They further stated that they had signed Ext.P1 as PW.5 had asked them to do so. None of these witnesses stated that the police had seized the contraband articles from the accused. They stated that the police had the contraband articles with them.

7. It is clear from the evidence of PW.5 that four police constables had accompanied him to the place of occurrence and that P.C. No.1462 had tried to catch hold of the accused. But, none of the police constables were examined in this case to prove the seizure of the contraband articles. The appellant had also stated when questioned under Section 313 Cr.P.C. that the case was foisted against him as he had filed a complaint against the police officers of Kattappana Police Station in Crime No.619 of 2001. PW.5 himself had admitted that such a case was registered on the basis of the complaint filed by the appellant. In the above circumstances, the trial court was not correct in placing reliance on the evidence of PW.5. Though PWs.1 to 4 were examined as independent witnesses, they had not supported the prosecution case.

8. The next question is regarding the finding entered by the trial court that the appellant was guilty under Section 55(a) of the Abkari Act. The prosecution has no case that the appellant was found in possession of arrack in the course of export, import, transport or transit. As per the principles laid down in the decisions referred to above, an offence under Section 55(a) of the Abkari Act will be attracted only on adducing evidence to the effect that possession of the contraband article was in

connection with export, import, transport or transit. Hence, the finding of the trial court that the appellant committed offence under Section 55(a) of the Abkari Act is also not legally justifiable.

9. On an overall appreciation of the entire evidence, it is seen that there is no independent evidence to show that the contraband articles were seized from the appellant. Hence, the benefit of doubt has to be given to the appellant. In the above circumstances, the conviction and sentence ordered against the appellant - accused in S.C. No.175 of 2004 on the file of the Additional Sessions Court (Spl. Court for N.D.P.S. Act Cases), Thodupuzha are set aside and the appellant is acquitted. The appellant shall be released forthwith, if he is not wanted in connection with any other case.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A. NO.2036/2006

JUDGMENT

18TH JANUARY, 2007.